(4) (3)

Nos. 99-1462 & 99-1745

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE CITY OF FORT WORTH, TEXAS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

* * *

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT LEGEND AIRLINES, INC.'S BRIEF IN OPPOSITION

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35 (1)

QUESTIONS PRESENTED

I. Whether The Fifth Circuit Decisions (I) That The Airline Deregulation Act Preempted An Alleged Agreement Between The Cities Of Dallas And Fort Worth To Restrict Service At Love Field, And (II) Whether The Proprietary Powers Exception 49 U.S.C. § 41713(b)(3) Does Not Allow Dallas To Impose Route Limiting Restrictions, Did Not Conflict With Other Courts Of Appeal?

II. Whether The Court Should Deny Fort Worth's Petition Because DOT Has Authority To Administer And Interpret Federal Laws Pertaining To Aviation And Neither 28 U.S.C. § 1738 Nor Common Laws Rules Of Issue Preclusion Bind DOT To A State Court Decision To Which It Was Not A Party?

LIST OF INTERESTED PARTIES

The petition accurately lists the parties to this proceeding.

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STATEMENT OF CASE

I. Introduction

For over 30 years, a handful of parties have attempted to prevent airline competition in the Dallas-Fort Worth marketplace. Fortunately for the people of Texas and across the nation, these parties failed in their multiple attempts to destroy Southwest Airlines. The anti-competitive campaign, however, continues as Petitioners fight to keep another new entrant carrier from operating.

If the single most important question in this case is as American Airlines, Inc. ("American") claims "whether the Airline Deregulation Act of 1978 ("ADA") preempts the authority of local governments to implement regional plans that allocate particular types of air traffic to specific airports," the answer is simply, yes. The ADA preempts local authorities from implementing plans that regulate "price, route, or service of an air carrier" with limited exceptions for an airport proprietor. Courts have consistently held that proprietary powers and rights are extremely narrow and require numerous factors to be met before specific and reasonable limited restrictions are allowed. Not only do Petitioners fail to demonstrate the requisite need for imposing restrictions, the type of restriction they seek, to limit airline service from Love Field to Texas and four contiguous states to prevent competition, is prohibited under all circumstances and is significantly more onerous than restrictions found at any other airport in the world. Petitioners' untenable argument that airport proprietors can restrict the routes, number of passengers on an aircraft, and whether airlines can offer connecting

flights, would usurp the authority of the ADA and wreak havoc on the national aviation system.

II. Relevant Facts

For many years, the cities of Dallas and Fort Worth each operated a local airport and fought over which airport should be the area's principal airport. In 1968, Dallas and Fort Worth agreed to create Dallas-Fort Worth International Airport ("DFW") as the metropolitan area's primary airport. As a part of their agreement, Dallas and Fort Worth jointly passed a bond ordinance, the 1968 Regional Airport Concurrent Bond Ordinance ("Bond Ordinance"), to fund DFW. In the Bond Ordinance, the cities agreed to take "legally permissible" steps to phase out "certificated air carrier" service at other airports in the area, including Love Field. They did not try to close the airport. They did not form a single authority to operate both DFW and Love Field. Instead, a new airport board was created to govern DFW, while the City of Dallas remained the sole proprietor of Love Field. When Southwest Airlines, then an intrastate-only airline, refused to move to DFW, Dallas and Fort Worth sued to require Southwest to move to DFW.[1] Ultimately the case -

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[1] Those parties were trying to force Southwest to take the specific suicidal step of abandoning Love Field and moving to DFW, where American Airlines could "deal" with it.

> Southwest employees knew they were fighting for their survival. The battle over Love Field was a life-and-death situation for Southwest; had it been forced to move to DFW, it would have gone bankrupt. Southwest employees knew it, the cities of Dallas and

was heard by the United States Court of Appeals for the Fifth Circuit, which decided that Southwest had a federally declared right to the continued use of and access to Love Field despite the cities' arguments that this would violate their agreement. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir. 1974).

In 1978, Congress deregulated the airline industry by enacting the ADA, which divested the states and their political subdivisions of the power to economically regulate airlines. The ADA did this by barring states or local governments from enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1).[2] After passage of the ADA, Southwest

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Fort Worth knew it, and the other airlines knew it. Kevin Freiberg & Jackie Freiberg, *Nuts! Southwest Airlines' Crazy Recipe for Business and Personal Success* 27 (1996).

[2] The ADA also instructed the Secretary to consider the following matters as being in the public interest:

- Placing maximum reliance on competitive market forces and on actual and potential competition
- Avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation
- Encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry

49 U.S.C. § 40101(a).

initiated interstate service at Love Field. Concluding that the ADA preempted Fort Worth and Dallas from enforcing a provision in the Bond Ordinance designed to prohibit interstate service at Love Field, the U.S. Civil Aeronautics Board ("CAB") granted Southwest the authority to offer interstate service. *Southwest Airlines Automatic Market Entry Investigation*, CAB Docket 34582, Initial Decision (June 28, 1979), Order 79-9-129 (September 28, 1979). Unable to block competitive services through the courts, American Airlines, Dallas and Fort Worth asked Congress to restrict Southwest operations to only intrastate service. Consequently, House Speaker Jim Wright of Fort Worth introduced a bill that would ban any airlines operating at Love Field from flying outside of Texas. Congress rejected this extremely limiting proposal to limit Love Field only to intrastate service and instead passed the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35 (1980) (the "Wright Amendment") that authorized: 1) flights on any type aircraft within Texas and its four contiguous states, Louisiana, Arkansas, Oklahoma, and New Mexico; and 2) flights to any airport on "aircraft with a passenger capacity of 56 passengers or less." In addition, it restricted the number of charter flights, through ticketing and certain advertising. Without this specific Congressional action enacting the Wright Amendment, no restrictions on air carrier operations would exist at Love Field. Carriers would be able to fly anywhere.

To address the importance of expanded airline competition, in 1997, Congress enacted the Shelby

Amendment, which amended the Wright Amendment.[3] The Shelby Amendment added three additional states (Mississippi, Alabama, and Kansas) to the four contiguous states service limitation, and clarified the meaning of the 56-passenger authority by specifying that airlines may provide unrestricted interstate service in aircraft reconfigured to carry no more than 56 passengers[4] as long as the aircraft does not exceed the gross aircraft weight of 300,000 pounds.[5]

American misleads the Court by claiming that the Bond Ordinance declares:

> Love Field not available as a point of origin or destination for scheduled long-distance flights, just as if Love Field did not exist . . . [n]o airline would operate long-distance flights from Love Field, and all could operate short-distance flights.

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[3] Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, § 337, 111 Stat. 1425 (1997).

[4] Congress considered a number of possible limitations on the proposed expanded operations at Love Field, including whether the cities should be able to have any control over Love Field expansion. The Congressional conference committee rejected a provision that would give Dallas authority to veto any new authority operated under the Shelby Amendment, as well as a proposal to provide the Fort Worth City Council with similar veto authority.

[5] Although Congress could have limited 56-seat jet aircraft to turboprops, or specifically excluded regional jets, it did not adopt these approaches. Instead, Congress chose a weight limit that includes the aircraft to be operated by Legend along with larger aircraft.

(American Pet. 24.) Contrary to American's statement that Dallas "has held Love Field open only for short distance flights within Texas and four contiguous states" (American Pet. 24), the Shelby Amendment expanded the Love Field service area to seven states and acknowledged that jets with restricted seating could be utilized to serve any market. Clearly, the service area restrictions and the 56-passenger authorization are in place because Congress put those restrictions on Love Field, not because of Dallas' proprietary rights. The Bond Ordinance does not contain any operational restrictions. It does not mention limiting flights nor does it mention short distance versus long distance flights. The only restrictions at Love Field are those imposed by the Wright and Shelby Amendments.

Under the authority of the Wright and Shelby Amendments, Legend Airlines, a start-up airline, proposed to offer service from Love Field to any airport in the country with jets reconfigured to seat no more that 56 passengers.

Before the President signed the Shelby Amendment into law, Fort Worth filed a lawsuit in Texas state court asking the court to render a judgment that Dallas must ban the types of interstate service at Love Field expressly authorized by the Wright and Shelby Amendments. Fort Worth, American and DFW sought to block service at Love Field proposed by Legend and Continental Express. Even though Fort Worth, DFW and American claimed that Legend's and Continental Express's proposed operations under the Shelby Amendment are not permitted,

they have not challenged operations initiated by Southwest under the authority of the Shelby Amendment.[6] Fort Worth, American and DFW do not explain how Southwest is able to operate its new "through ticketing" flights allowed by the Shelby Amendment while all other operations under that same statute are blocked.[7] The only explanation of how Southwest's Shelby Amendment service is permitted is found in the following article from The Dallas Morning News (December 3, 1997), "Crandall drops through ticketing opposition at Love":

> The head of American Airlines, Inc. indicated that the airline no longer opposes "through ticketing" from Dallas Love Field.

Apparently, American believes that it can decide which provisions of federal law it will accept and which flights are permitted at Love Field.

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[6] Upon passage of the Shelby Amendment, Southwest:

> began offering for sale connecting service between Love Field and both Jackson, Mississippi and Birmingham, Alabama. In addition, the Shelby Amendment has allowed Southwest, for the first time, to offer for sale service between Lubbock, Texas and Birmingham; between Amarillo, Texas and both Jackson and Birmingham; and between Midland-Odessa, Texas and Birmingham. This service was not previously available because the flights serving Lubbock, Amarillo, and Midland-Odessa all stopped at Love Field, because through and connecting service could not be offered beyond Texas and the four states contiguous to Texas.

Southwest Brief 13, *American Airlines v. Department of Transportation*, No. 99-60008, July 19, 1999.

[7] American has claimed that the Shelby Amendment was not valid because local parties did not agree to it. (Letter, July 6, 1998).

Petitioners' reluctance to take on Southwest is due in part to a court order arising out of a 15-year litigation campaign against Southwest. Petitioners have been bound since 1982 by a federal district court injunction that prohibits them from litigating in any other court "the validity, effect or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as it may affect the right of [Southwest] to the continued use of and access to Love Field . . . "[8] That injunction, to which Petitioners agreed, was designed to end the years of litigation Petitioners and others had unleashed upon Southwest concerning its refusal to move its operations from Love Field to DFW when the airport opened in 1975. For years, Southwest was forced to fight an extremely costly legal battle (similar to Legend's current battle) on several fronts, in order to exercise its federally assured rights. The federal district court, seeking to bring closure to the issue of Southwest's right to operate at Love Field (which was previously upheld by that court in 1973 and affirmed by the Fifth Circuit in 1974, with certiorari denied in December 1974), stated in no uncertain terms that piecemeal litigation of the issue would no longer be tolerated. Instead, because the efforts of Petitioners and others were deemed to subject Southwest to "multiplicitous and further vexatious litigation" and to adversely affect Southwest's "finances, customer and business relationships, and shareholder interests," the court ordered that it, and it alone, would be the

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[8] *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678, 684 (N.D. Tex. 1975).

proper forum for any and all further litigation of the issues affecting Southwest's rights. *Id.*

It is therefore not surprising that Petitioners attempted to narrowly tailor their requested relief so as to avoid implicating the operations of Southwest, although they failed in their effort. The relief requested in the state court proceeding did directly affect, and in fact sought to preclude, Southwest's right to offer "through ticketing" from Love Field to Mississippi and Alabama – service that Southwest began immediately after the enactment of the Shelby Amendment. The state court's December 16, 1998 final judgment decreed that Dallas was "obligated to prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states," and it made no exception for the through ticketing service Southwest had by that time been offering for months.[9]

In 1998, several parties in the Texas litigation now before this Court asked DOT for assistance in settling the dispute. Because the resolution of the Texas state court case depended on the interpretation of federal aviation laws, and because DOT is charged with administering these laws, on August 25, 1998, DOT instituted a public interpretive proceeding to resolve the disputed issues. All parties fully participated in the four month interpretive proceeding. Fort Worth, American and DFW submitted approximately 45 documents (over 1000 pages) to the Department during this process.

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[9] *City of Fort Worth v. City of Dallas, et al.*, 48th District Court, Tarrant County, Texas, No. 48-171109-97.

On December 22, 1998, after notice and opportunity for comments by all affected parties, DOT issued rulings on the federal law questions and various procedural issues raised by the parties. DOT held that federal law barred Dallas from imposing the kind of route restrictions on Love Field flights sought by Fort Worth, American and DFW:

> an airport owner's ability to restrict the type of service operated at its facilities is limited in that any such restrictions must be non-discriminatory, reasonable, and based on a showing that they are necessary to achieve legitimate airport goals. The Fort Worth parties have made no showing that the restrictions they wish to impose on Love Field meet this standard.

(Pet. App. 105.)

Fort Worth, American and several other parties petitioned the Fifth Circuit for review of DOT's orders. The state court temporarily stayed its proceeding pending the Fifth Circuit's decision. On February 1, 2000, the Fifth Circuit affirmed DOT's orders on all grounds. The Fifth Circuit held that it was:

> open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's powers under sec. 41713(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exemption beyond its intended limited reach.

(Fort Worth Pet. App. 38.)

Fort Worth petitioned that decision to this Court on March 3, 2000. On April 5, 2000, Legend initiated service at Love Field. On May 1, 2000, American commenced Love Field service and filed its petition with this Court. Continental Express is scheduled to start Love Field-Cleveland service on June 1, 2000. At the same time, DFW operations continue to grow.

On January 27, 2000, the federal government filed suit against American and Fort Worth to enforce DOT Orders and to prevent them from interfering with operations authorized by the Wright and Shelby Amendments. In its Motion for Summary Judgment, the government stated:

> Fort Worth and American nevertheless continue to seek to impose restrictions on service at Love Field through the Texas state courts. In the past few months, their immediate goal has been to prevent Legend from commencing its planned operations from Love Field. This activity directly violates DOT's Order. Since the filing of this suit and the issuance of the Fifth Circuit's opinion, Fort Worth and American continue to violate DOT's order. Specifically, neither Fort Worth nor American has sought to dismiss or withdraw their state court suit, although they have had ample opportunity to do so, and Fort Worth continues its active involvement in the state court litigation. Accordingly, the federal plaintiffs bring this action pursuant to 49 U.S.C. §§ 46106 and 46107 to enforce DOT's Order. Plaintiffs specifically seek a permanent injunction barring American and Fort Worth from continuing to prosecute the state court litigation

> and directing them to dismiss or withdraw their state court complaint.

Memorandum in Support of Plaintiff's Motion for Summary Judgment. No. 3:00cv238-r. U.S. District Court, Northern District of Texas, Dallas Division (April 3, 2000).

Meanwhile, the Texas state district court judge ignored the ongoing DOT proceeding and all DOT documents addressing Love Field authorities and rendered a decision approximately one month after the interpretation proceeding was initiated. In a partial summary judgment opposed by Dallas (among others), the state court ruled that federal law did not preempt Dallas' ability to enforce an alleged agreement by local parties to restrict service at Love Field.

On May 25, 2000, the Court of Appeals for the Second District of Texas, Fort Worth reversed the lower court's decision holding that the ADA preempted the Bond Ordinance and that it was not within Dallas' proprietary rights to regulate routes at Love Field without legitimate justifications.[10] The court also found that Legend's and Continental Express's operations were authorized by the Wright and Shelby Amendments.

> Appellees argue that the courts in *Western Air Lines* and *City of Houston* approved route restrictions that are similar to the restrictions at issue here. Those restrictions, however, were not upheld to limit competition between airports, but because the airport proprietors had demonstrated that the restrictions were necessary to achieve legitimate airport goals – the prevention of congestion, "harsh environmental effects,"

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[10] *Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV.

and to prevent the shut down of operations at a neighboring airport. In contrast, there is no showing here that the Bond Ordinance restrictions are necessary to further any legitimate operational or safety goal, or to maintain the financial viability of DFW.[11]

REASONS FOR DENYING THE WRIT

I.

The Fifth Circuit Decisions (I) That The Airline Deregulation Act Preempted An Alleged Agreement Between The Cities Of Dallas And Fort Worth To Restrict Service At Love Field, And (II) That The Proprietary Powers Exception 49 U.S.C. § 41713(b)(3) Does Not Allow Dallas To Impose Route Limiting Restrictions, Did Not Conflict With Other Courts of Appeal.

The Fifth Circuit's decision does not conflict with the Second Circuit or deviate from its earlier decision in *City of Houston v. Federal Aviation Administration, et al.*, 679 F.2d 1184 (5th Cir. 1982). Petitioners' assertions to the contrary are inaccurate. Petitioners fail to demonstrate that the Love Field service area restrictions are a permissible exercise of proprietary rights.

The ADA's preemption provision set forth in 49 U.S.C. § 41713(b)(1), is expansive and must be interpreted "broadly." *Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392, 393 (N.D.Tex. 1995), citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Under the ADA, a state or political subdivision "may not enact or enforce a

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[11] *Id.* at 23-24.

law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . " This Court has recognized that the purpose of the broad prohibition in Section (b)(1) is to "ensure that States would not undo federal deregulation with regulation of their own." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995). There is, however, a very limited exception to the preemption provision for proprietary powers. Proprietary powers may be the basis for limited restrictions only if such restrictions are "reasonable, non-arbitrary and nondiscriminatory." *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). It is inconceivable that any court would find a restriction that in certain directions limits operations to within 250 miles and also limits the number of passengers on each flight, through ticketing, charter flights, advertising and that intended to prevent airline competition, to be reasonable. Such limitations run contrary to the clear meaning of the ADA.

In the interpretive proceeding, DOT concluded that restrictions agreed to by Dallas and Fort Worth were preempted by the ADA and were not valid exercises of proprietary rights. The Fifth Circuit affirmed DOT's interpretation of the preemption provision and held that Section (b)(1) preempted any agreement by the cities to restrict service. The only proprietary interest served by such a burdensome restriction is the financial interests of Fort Worth, DFW, and American Airlines, which is not the type of proprietary power exempted from the preemption provision.

There are only two cases in which Circuit courts have upheld perimeter rules, *Western Air Lines* and *City of Houston*, and neither one of these cases conflicts with the decision reached in the present case. In fact, both cases serve to distinguish acceptable proprietary interests from those articulated by Petitioners. The differences between the Love Field service area and the perimeter rules at Ronald Reagan Washington National Airport ("National") and LaGuardia are glaringly apparent. In neither case did the Circuit courts hold that an airport proprietor could restrict service to "prevent" competition. Rather, *City of Houston* and *Western Air Lines* support the finding that Dallas may not implement the perimeter and aircraft size restrictions sought by Petitioners. For Petitioners to claim that National and LaGuardia perimeter rules are "virtually identical" to Congressionally mandated restrictions at Love Field is without basis in fact and law. (American Pet. 17.)

Other than the Bond Ordinance which required the phase out of service to the extent "legally permissible," no party has identified any other "agreement" between Dallas and Fort Worth restricting service at Love Field. Fort Worth refers to "the four state perimeter rule" (Pet. 11) as if there existed another restriction other than the Wright Amendment to limit service to Texas and the four bordering states. There is not. If such an "agreement" existed, neither Fort Worth nor its partners have described when and where it was modified to permit Southwest's operations under the Shelby Amendment.

In *City of Houston*, the Fifth Circuit found that the perimeter rule imposed by the Federal Aviation Administration ("FAA") at National was permissible in part

because the FAA, as an arm of the federal government, does not fit within the restrictions of Section 105 of the Federal Aviation Act, which removes control over routes, etc., from local airport proprietors. Furthermore, the court held, on independent grounds, that the FAA, as a multi-airport proprietor, had sufficient proprietary interest to justify the perimeter rule. Because the FAA is not governed by the same rules as a local proprietor, and because the FAA is a multi-airport proprietor, Fort Worth's reliance on this case is misguided.

As a proprietor of both National Airport and Dulles, the FAA justified a 1000-mile[12] perimeter rule that required nonstop long-haul flights to use Dulles International Airport ("Dulles"). This was done to control severe congestion problems at National Airport and to help the then floundering, underutilized Dulles.[13] As the Fifth

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[12] The perimeter rule was originally 650 miles; it was twice expanded and is now 1,250 miles. In the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Congress has decided to allow some flights beyond 1,250 miles.

[13] In attacking the National Airport 1,000 mile perimeter rule (before it was expanded to 1,250 miles), American in comments submitted to FAA argued that the rule was arbitrary by stating:

> The proposed rules impose substantial costs on the economy, the public and upon the airlines, and do so in a discriminatory manner. Under the perimeter rule, citizens from states outside the perimeter are deprived of nonstop access to National and forced to incur costs, accounting to hundreds of millions of dollars in total.

(September 22, 1981)

Circuit noted, "one could shoot off a cannon in the Dulles terminal at midday without a chance of hitting anyone." (*City of Houston*, 679 F.2d at 1191.) Such is not the case at DFW, one of the nation's busiest airports.

In addition, in implementing and adjusting the perimeter rule, the FAA solicited and received comments from the "public, members of Congress, federal agencies, state, municipal and local agencies, public organizations, private companies and interested individuals before it imposed its rule." *Id.* at 1188. If Petitioners believe that the "perimeter" rule applicable at National Airport serves as precedent for creation of a limitation at Love Field, they should note that the National Airport rule is codified in federal law (49 U.S.C. Section 49109). This section states:

> An air carrier may not operate an aircraft nonstop in air transportation between Ronald Reagan Washington National Airport and another airport that is more than 1,250 statute miles away from Ronald Reagan Washington National Airport.

Additionally, Congress again modified the National Airport perimeter rule when it recently enacted the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("FAIR-21"), which allowed additional flights beyond the perimeter. The National Airport

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> There is no rational basis for this discrimination among cities, many of which compete vigorously with one another to attract business locations, conventions and vacation travel.

(May 19, 1981)

"perimeter" limitation is not mandated by local agreement or by a multi-airport authority but is controlled by federal law, as the Wright and Shelby Amendments control operations at Love Field.

In *Western Air Lines*, the district court upheld a 1500-mile perimeter rule[14] imposed by the Port Authority of New York and New Jersey at LaGuardia[15] made necessary by severe ground congestion at LaGuardia. 658 F. Supp. at 952. As a result of congestion on the ground and in the terminal, the Port Authority required that flights over 1500 miles were required to utilize John F. Kennedy International Airport ("JFK"), a then under-utilized airport, or Newark Airport. The court held that as a multi-airport proprietor of LaGuardia, Newark, and JFK, the Port Authority could, under its "extremely limited" proprietary powers, regulate ground congestion at its airports as that "would appear to be at the core of the proprietor's function as an airport." 658 F. Supp. at 956-97. Furthermore, the court noted that it must carefully scrutinize all exercises of local power to determine whether they are reasonable, non-arbitrary and non-discriminatory, to ensure that "impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." *Id.* at 1019, *citing British Airways Bd. v. Port Authority of New York and New Jersey*, 564 F.2d 1002,

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[14] With a number of cities outside the perimeter grandfathered, including Denver.

[15] The rule contained no restrictions on aircraft size, number of seats, prohibition on through ticketing or advertising.

1011 (2nd Cir. 1977). Restricting service at Love Field, as the Petitioners would like to do, would inhibit the legitimate national goal of competition.

On appeal, the Second Circuit affirmed the perimeter rule as permissible "at least when enacted by a multi-airport proprietor." 817 F.2d at 226. This hardly supports Fort Worth's bold assertion that an asymmetrical perimeter rule (limited to 250 miles in some directions) with various other restrictions to ***prevent competition*** "fall squarely within the proprietary rights exemption." (Fort Worth Pet. 15.)

More recently, the Second Circuit held that a proprietor of a Manhattan heliport could impose restrictions on helicopter operations to regulate noise levels but could not regulate helicopter flight paths. *National Helicopter Corp. v. City of New York*, 137 F.3d 8 (2nd Cir. 1998). An airport proprietor may restrict service at an airport only by showing that the restrictions are necessary to carry out a legitimate goal, are not arbitrary, and are reasonable. *See National Helicopter Corp.*, 137 F.3d at 89; *British Airways Board* at 1011. The Second Circuit found that the proprietary power exception "gives no authority to local officials to assign or restrict routes." 137 F.3d at 92.

The Second and Fifth Circuit have never established a rule as broad as Fort Worth and American suggest that would permit airport proprietors to protect a dominant airport from any competition. Rather the Fifth Circuit noted that:

> [the] Second Circuit upheld only the restrictions that were aimed at reducing noise or other environmental concerns at the heliport. Significantly,

> the court struck down the restriction on sightseeing routes, finding that "Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted." *Id.* at 92.

Unlike the situation presented in *Western Air Lines* and *City of Houston*, where the multi-airport proprietors sought to reallocate some traffic from their thriving and congested airports to underutilized airports, Petitioners seek to impose an unreasonable and discriminatory perimeter rule at Love Field to protect the nation's second largest airport, DFW, and one of the world's largest carriers, American Airlines, from economic competition at the smaller airport.[16] The Fifth Circuit properly determined that Petitioners' rationale for seeking to block service at Love Field was not supported by the above cases.

In neither *Western Air Lines* nor *City of Houston* was there a limitation of aircraft weight and number of passengers allowed on aircraft. The only aircraft size and weight limitations imposed at National and LaGuardia Airports are imposed by the FAA, in its role as the federal agency responsible for safety and air traffic.

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[16] Some parties have referred to the four state service area as a "perimeter rule." Perimeter rules have historically been defined by exact mileage restrictions (1,250 mile National Airport Rule and 1,500 mile LaGuardia Airport perimeter rule). The Wright Amendment restrictions are uneven, varying from approximately a 250 mile perimeter rule to the east and north to a 700 mile perimeter to the west. In addition, the Love Field restrictions limit the number of passengers on each aircraft and the size of aircraft.

As support for their position that an airport proprietor can bar certain service to prevent competition between airports, Petitioners also erroneously rely on the Colorado Supreme Court's decision in *Arapahoe County Public Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). First, the issue in *Arapahoe* was whether the airport authority could prohibit scheduled air carrier service out of Centennial Airport, a reliever airport that had never before had scheduled passenger service. Consequently, the airport was not equipped to handle passengers as it did not have a terminal, baggage system, or passenger security system. *Id.* at 590. The question before the Colorado Supreme Court, whether a municipality must open an airport to scheduled service, is not at all analogous to Love Field. Love Field has accommodated scheduled air service for over 30 years on aircraft of all sizes, including Air Force One.

Moreover, in *Arapahoe*, the court found that the airport authority "is not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge and where they can fly." *Id.* at 595. Thus, *Arapahoe* does not support Petitioners' contentions that Dallas can determine where airlines can fly. Nowhere does *Arapahoe* state that "[r]estricting classes of service at an airport, on the basis that does not discriminate among airlines, is part and parcel of a proprietor's right to control the size of its airports." (American Pet. 13.)

To the extent that *Arapahoe* expanded the scope of proprietor's rights in holding that the airport authority could proscribe scheduled passenger service, the FAA has

challenged the decision and determined that it was erroneously decided. *Centennial Express Airlines, et al. v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1. Consistent with DOT rulings and the Fifth Circuit decision, the FAA found that the airport proprietor does not have the authority to force scheduled service airlines to use Denver International Airport instead of Centennial Airport. (The FAA's order is currently under review in the Tenth Circuit. *Arapahoe County Public Airport Authority v. FAA*, 10th Cir. No. 99-9508.)

Because no conflict exists among the Circuit courts and Courts of Appeals, this Court should deny American and Fort Worth's Petitions for a Writ of Certiorari.

II.

The Court Should Deny Fort Worth Petition Because DOT Has Authority To Administer And Interpret Federal Laws Pertaining To Aviation And Neither 28 U.S.C. § 1738 Nor Common Laws Rules Of Issue Preclusion Bind DOT To A State Court Decision To Which It Was Not A Party.

As an initial matter, it is necessary to clarify Fort Worth's misleading statements that imply that DOT "relitigated" a case after it received an unfavorable decision in state court. Although Fort Worth would like the Court to believe that DOT instituted the interpretation proceeding **after** the Texas state court rendered a decision, such is not the case. DOT instituted the interpretation proceeding following numerous requests by the parties for guidance in Love Field issues while the state trial court proceeding (to which it was not a party) was pending. The state court erroneously failed to recognize

DOT's primary jurisdiction in aviation regulation, an area in which the Fifth Circuit noted "federal concerns are preeminent and where DOT is charged with representing those concerns." (Pet. App. 21.)

Moreover, on May 25, 2000, the Court of Appeals for the Second District of Texas, Fort Worth reversed the state court decision upon which Fort Worth relies. *See Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV. The Fort Worth Court of Appeals held that the ADA pre-empted the bond ordinance, that it was not within Dallas' proprietary rights to regulate routes at Love Field without legitimate justifications (which were not articulated by Fort Worth, American or DFW) and that Legend's and Continental Express's operations are authorized under the Wright and Shelby Amendments.

A. The Supremacy Clause Prohibits Fort Worth From Gaining Advantage By Obtaining A Friendly State Court Judgment As A Means Of Usurping Federal Authority Over Aviation Matters.

The attempts of Fort Worth, DFW and American to wrest control over air carrier operations through local litigation fails (except as an improper and expensive delay tactic) because it violates the Supremacy Clause of the U.S. Constitution. *See* U.S. CONST. art. VI, cl.2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby . . . "). Under the Constitution, any state law that frustrates or conflicts with the lawful objective of a federal statute must yield. *See United States v. Composite State Bd. of Med. Examiners*, 656 F.2d 131, 135 n.4 (5th Cir. 1981).

The Supremacy Clause protects efforts by federal agencies to administer and oversee the implementation of federal statutes. *See, e.g., NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320-21 (3d Cir. 1991). In fact, federal supremacy is particularly vital when applied to the ADA because the ADA's broad preemption provision effectuates Congress' goal of ensuring that local governments do not "undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

Federal aviation policies and regulations are matters of particular federal concern. *See New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 175 (1st Cir. 1989). The national aviation system cannot function without uniform and nationwide oversight by DOT. *See New England Legal Foundation*, 883 F.2d at 171, 175. Moreover, the ADA's goals of fostering competition for the benefit of the traveling public cannot be accomplished in a balkanized patchwork of local regulations and interests. *See* 49 U.S.C. § 40101(a)(4), (9), (10), (13), (14). DOT thus occupies the unique role of ensuring that competition works without undue local interference. *Morales*, 504 U.S. at 378.

Because of DOT's Congressionally delegated authority to administer and enforce federal policies related to aviation, including policies fostering competition, its decisions regarding the Shelby Amendment, Wright Amendment, and the ADA must supercede any contrary decision by a state court. *See Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979). The state court has no authority over federal aviation policy. *See American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972). Under

the Supremacy Clause, DOT properly initiated, considered, and concluded the interpretation proceeding, without regard to the pending lawsuit in Texas.

B. The Full Faith And Credit Statute And Common Law Rules Of Issue Preclusion Do Not Bind DOT To A State Court Decision To Which It Was Not A Party.

Under 28 U.S.C. § 1738, a federal court is required to give full faith and credit to a state court ruling. This Section of the Code does not apply to federal agencies. *See NLRB v. Yellow Freight Systems*, 930 F.2d at 320 (giving preclusive effect to state judgments would compromise agency's uniform enforcement of federal policies). Cases cited by Fort Worth on Section 1738 and common law issue preclusion are distinguishable from the present case.

In support of its assertion that Section 1738 should apply to federal agencies, Fort Worth wrongly relies on *Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18 (1st Cir. 1997) and *Town of Deerfield v. FCC*, 922 F.2d 420 (2nd Cir. 1993). Although the court in *Bath Iron Works* explained that the policy arguments for applying 28 U.S.C. § 1738 to both federal courts and federal agencies tend to be the same, the reasoning of the case focuses on a federal agency giving preclusive effect to a state agencies' prior decisions. To support this conclusion, the court cited a number of cases holding that a federal agency is normally bound to respect findings by another agency acting within its competence. The agency/agency relationship present in *Bath Iron Works* is not present here.

Furthermore, in *Bath Iron Works*, the court explained that "the point of collateral estoppel is that the first determination is binding not because it is right, but because it is first – ***and was reached after a full and fair opportunity between the parties to litigate the issue.***" *Id.* at 22 (emphasis added). DOT was not a party to the state court action and therefore, the Fifth Circuit's decision not to give preclusive effect to the Texas state court judgment was consistent with the policies underlying the doctrines of collateral estoppel and *res judicata*.

Similarly, Fort Worth mistakenly argues that the decision in *Deerfield* supports the proposition that Section 1738 should apply to federal agencies. First, the Second Circuit held that the FCC was bound by a prior *federal* court judgment, not a *state* court judgment. Second, the *Deerfield* court explained that "to accord full faith and credit to a given state-court judgment, the subsequent court must give a prior state court judgment the same preclusive effect as would be given that judgment under the law of the State in which judgment was entered." *Id.* at 429. Implied in this conclusion is the assumption that the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in state court.

DOT properly declined to give the state court judgment preclusive effect. As the Fifth Circuit held:

> [t]o allow the state court effectively to foreclose the administering agency from further consideration of the Shelby Amendment as to the parties which appeared before the state court would trump the key federal interests that motivated

> Congress to create DOT and give it authority over these laws.

(Pet. App. 22.)

The Fifth Circuit recognized that the state court decision would permit local parties to usurp federal authority and would have the disastrous effect of fragmenting the federal aviation regulatory scheme.

CONCLUSION

For the reasons given above, this Court should deny Fort Worth's Petition for a Writ of Certiorari.

Respectfully submitted,

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